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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Sun Insurance Office,
Appellant,
vs.
J. M. Scott,
Appellee.
No. 28

Norwich Union Fire Insurance Society, Ltd.,
Appellant,
vs.
J. M. Scott,
Appellee.
No. 29

The Home Insurance Company of New York,
Appellant,
vs.
J. M. Scott,
Appellee.
No. 30

BRIEF OF RESPONDENT AGAINST PETITION FOR WRIT OF CERTIORARI OF PETITIONER.

JAMES JOYCE,
EL WOOD MURPHY,
F. S. MONNETT,
Counsel for Respondent.

FORT HAMILTON & KINGSBURY, Law Printers, Columbus, Ohio.

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IN THE

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OCTOBER TERM, 1930.

Sun Insurance Office,
Appellant,
vs.
J. M. Scott,
Appellee.
No. 779.

Norwich Union Fire Insurance Society, Ltd.,
Appellant,
vs.
J. M. Scott,
Appellee.
No. 780.

The Home Insurance Company of New York,
Appellant,
vs.
J. M. Scott,
Appellee.
No. 781.

BRIEF OF RESPONDENT AGAINST PETITION FOR WRIT OF CERTIORARI OF PETITIONER.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a brief of J. M. Scott, respondent and appellee below in the consolidated cases of The Home Insurance

Company of New York, Sun Insurance Office and Norwich Union Fire Insurance Society, Ltd., Numbers 5275, 5278 and 5279 respectively, in the United States Circuit Court of Appeals, and all involving the same questions of law, so far as applies to the petition for writ of certiorari from the United States Circuit Court of Appeals to the United States Supreme Court.

This brief being an answer brief to the brief in common for the three appellants as fully appears in the summary of statements of the appellants in their consolidated brief, being a duplicate, and all cases raising the same questions.

The petition for writ of certiorari appears on page 1 to page 12 of counsel's brief herein in this court.

The status of the appellants in the state of Ohio is that each of said appellants are non-resident corporations exercising the functions of an insurance company in the state of Ohio, purely by the grace of certain statutes, granting said franchises to said foreign corporations. That the contracts complained about were all made in the state of Ohio after said companies filed its waivers with the insurance commissioner obtained their license to do business as a domestic corporation, and the suit was begun in the state courts to enforce the said contract under the said license requiring the companies to comply with the state laws and waiving the conditions of their contracts that in any wise contravened the state statutes.

That said appellants gained no rights by transferring to the federal court against the appellee, that were not available to the appellee, in the state courts.

A.

The insurance contracts were all intrastate contracts. There were no issues under the federal acts or federal decisions available to them that applied to them, (1), to interstate commerce; (2), any question of taxation; (3), any question of the United States mails; (4), any question of the constitutionality of any of the statutes under which they were acting.

Therefore, there was only one issue left for the application of this writ, to wit, was there a conflict between the decision of the United States Court of Appeals of the Sixth Federal District that had not been decided?

It is apparent from the brief of counsel for the appellant that they are lugging into this case under guise of a petition for writ of certiorari many issues that are wholly beyond the jurisdiction and functions of said writ.

First the waiver.

Section 644, General Code of Ohio, which this court takes judicial knowledge of the licensing of agents, provides as follows:

> Agent's license: "While such license remains in force, a foreign company shall be bound by the acts of the person named therein within his apparent authority as its acknowledged agent."

Section 9586, General Code of Ohio, also pertains to a solicitor agent of the company, as follows:

> Solicitor agent of company: "A person who solicits insurance and procures the application therefor, shall be held to be the agent of the party, company, or association, thereafter issuing a policy upon

such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding."

In the case at bar, the record shows, and the pleadings admit, that the Ohio agent of the three appellants located at Cumberland, Ohio, was one and the same, and that he was not a solicitor in the limited sense argued in the brief, because, he was a statutory agent and countersigned the policies themselves, upon which application the policies were issued and the premiums paid and received and held.

This eliminates all the objections that counsel for the appellants has been trying to inject in this case from the beginning of the trial to the end, treating it as though it was superior to the laws of the state of Ohio, and as though it involved some laws pertinent to the mails, or to taxes, or to interstate commerce.

If your honorable court follows the doctrine that our federal court and the Court of Appeals have followed, to wit, under this domesticated company, with their waivers, the questions relied upon by counsel in their single cited case, to wit, Atlas Reduction Company v. New Zealand Insurance Company, 138 Fed., 497, this case will not avail them.

We call the court's attention to the consideration the highest court of the state of Ohio gave when passing upon the provisions of said Section 9586, General Code of Ohio, to wit:

"The company is bound by the mistakes of a soliciting agent who does not fill up an application as directed by the applicant."

Insurance Company v. Williams, 39 O. S., 584.

"Stipulations in policy that the agent is agent of assured, are void."

Insurance Company v. Leslie, 47 O. S., 409.
Dayton Ins. Co. v. Kelley, 24 O. S., 345.

"An insurance company is liable upon an oral insurance contract made by its agent on its behalf, notwithstanding that the policy issued by the company varies, without the knowledge of the insured, from the contract made between the insured and the agent."

Insurance Company v. Houck, 32 O. C. A., 429.
Motion to require Court of Appeals to certify the record, denied by the Supreme Court on May 23, 1922.

"Under Section 9586, G. C., solicitor of insurance procuring application on which policy is later issued by insurer is agent of insurance company, which is presumed to know and ratify acts and conduct of solicitor by execution and delivery of policy."

Mechanics' & Traders' Ins. Co. v. Himmelstein, 24 Ohio App., 29.

These statutes and similar statutes all are sustained by this court, notwithstanding similar statutes are provided for intrastate business by the grace of sovereignty and they are obliged to submit to our statutes and the decisions of the courts are part of the statutes.

The highest court has construed this statute also in the case of Foster v. Scottish Union & National Insurance Company of Edinburgh, 101 O. S., 180, in Syllabi 1, 2, 3 and 4.

This case was fully considered again in The Hartford Ins. Co. v. Glass, 117 Ohio St., 145, to wit:

"Chattel mortgage existing when policy issued, but consent not indorsed thereon — insurer liable where agent had knowledge of incumbrance."

On page 146 of said case it is held by the court:

"The principal question presented in this case is whether the existence of a chattel mortgage upon a portion of the personal property covered by this insurance policy wholly relieves the insurance company from liability thereunder, when in fact the agent of the company who procured the insurance prior to and at the time of the issuance of the policy had full knowledge respecting such incumbrance, but failed to have consent thereto indorsed upon the policy.

"Substantially the same question was considered and decided by this court in the case of Foster v. Scottish Union & National Ins. Co., 101 Ohio St., 180, 127 N. E., 865, and that decision, unless it is to be overruled, requires an affirmance of the judgment of the Court of Appeals. There is the same distinction between this case and Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St., 161, 92 N. E., 82, as was pointed out by the court in the Foster case, and the reasoning of the court in the latter case is applicable and persuasive here.

"The recent case of Michigan Automobile Ins. Co. v. Van Buskirk, 115 Ohio St., 598, 155 N. E., 186, is distinguished from the Foster case, as pointed out in the opinion, and may likewise be distinguished from this case in that the existance of the chattel mortgage was not known either by the company or its agent when the policy was issued."

Our Supreme Court is in harmony with the numerous authorities of your honorable court on this proposition.

We cite the court to the case of The Great American Mutual Indemnity Co. v. Jones, 111 O. S., 84.

His Honor, Chief Justice Taft, in the case of National Union Fire Ins. Co. v. Wanberg, 260 U. S., 71, on page 75, speaks of the requirements of state statutes, and announces the doctrine:

> "that requirements of the statute may bear more heavily on foreign companies whose principal offices may be far removed than upon those whose headquarters are within the state is a circumstance necessarily incident to their conduct of business in another state, of which they cannot complain. They cannot expect the laws of the state to be bent to accommodate them, as a matter of strict legal right, however, wise it may be for a legislature to give weight to such a consideration in securing the use of foreign capital for its people. Moreover, as the business of such insurance companies is purely intrastate the state has power to require them to accept conditions different from those imposed on domestic corporations."

New York L. Ins. Co. v. Deer Lodge County, 231 U. S., 495.
Paul v. Virginia, 8 Wall., 168.
Hooper v. California, 155 U. S., 648.
Whitfield v. Aetna L. Ins. Co., 205 U. S., 489.

The doctrine in state and federal authorities has always been that where a contract of foreign corporations or even a domestic corporation, that is in anywise recognized by constitutional statutes, they cannot be abrogated by conditions in the contract in such states. As the courts happily express the doctrine, even such pertinent

statutes is by implication of law written in the contract. And any language contravening such statute is a nullity.

See the case of Union Trust Company v. Minnie K. Grosman, 245 U. S., 412.

> "In every forum a contract is governed by the law with a view to which it is made, because, by the consent of the parties, that law becomes a part of their agreement; and it is, therefore, to be presumed, in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated."
>
> Eliza D. Pritchard, etc., v. Ex. Norton, 106 U. S., 124, Syllabus 2.

Justice Stone announced an opinion in the case of Stipcich v. Metropolitan Life Insurance Company, 277 U S., 314, Syllabus 5:

> "If provisions in an insurance policy are with equal reason open to two constructions, that most favorable to the insured will be adopted."

On top of page the court announced the doctrine:

> "Narrow and unreasonable interpretations of clauses in an insurance policy are not favored. They are prepared by the insurer and if, with equal reason, open to two constructions, that most favorable to the insured will be adopted."
>
> Mutual L. Ins. Co. v. Hurni Packing Co., 263 U. S., 167, 31 A. L. R., 102.
> American Surety Co. v. Pauly, 170 U. S., 133.

"A state may prohibit a foreign insurance company from doing business within its limits without

first complying with conditions prescribed by it, and may refuse the aid of its courts in enforcing a contract which involves violation of its laws."

James W. Bothwell, etc., v. Buckbee, Mears Co., 275 U. S., 274, and Judge Brandeis rendered the opinion.

B.

The reasons relied upon for the allowance of the writ must stand or fall upon the divided court in the case of Atlas Reduction Co., etc., v. New Zealand Ins. Co. of New Zealand, 138 Fed., 497, which will hereafter be referred to as the Atlas case. This case is discussed under appellant's subdivisions 8, 9, 22, 23, 24, 29, 31 and 39.

Two judicial giants, Judge Van Devanter and Judge Hook, then sitting in the Circuit Court of Appeals of the Eighth District on April 24, 1905, some twenty-six years ago, considered the Atlas case referred to. Search of the records finds this case to be reported in 9 L. R. A. (N. S.), 433. A footnote in that standard record of cases says:

"A thorough search has failed to disclose any other cases on the question what will amount to a written indorsement of consent to an encumbrance upon insured property, within the meaning of a policy requiring such consent to be in writing."

Upon thorough search I find this question acutely before the Circuit Court of Appeals in the case at bar from the Sixth District, and appears on page 227 of the record in the majority opinion in this case and again on page 241 of the record in the minority or dissenting opinion of Judge Killits.

The three policies in the consolidated cases at bar contained riders set forth in the record at various places and in the pleadings and again in the record on page 227 of the opinion. The pleading of the appellants in the original action sets forth in the answer to the second amended petition on page 36 the following admissions:

> "This defendant alleges that subsequent to said fire the plaintiff further falsely and fraudulently stated in writing under oath to this defendant that no other person or persons had any interest in said wool or any part thereof contained in said barn at the time of said fire except a chattel mortgage to The Cumberland Savings Bank Company of Cumberland, Ohio; whereas, in truth and fact as the plaintiff then well knew another person, firm or corporation other than the plaintiff and other than the said The Cumberland Savings Bank Company of Cumberland, Ohio, had title to or an interest in said wool or a part thereof located in said building at the time of said fire."

That concession of pleading admits that The Cumberland Savings Bank of Cumberland, Ohio, had an interest in said policy and the rider is in accordance with the provisions of the policy itself, requiring notice in a rider so attached to the policy, that there is another party than the original insured that has an interest in said contract. The two provisions (1) requirement of the policy, and (2) fulfillment of the requirement as to interest of lien, these are set forth on page 21 of the record which is as follows:

> "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other

than unconditional and sole ownership; or if the subject of insurance be * * * personal property and be or become incumbered by a chattel mortgage."

"Loss Payable Clause"

"Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, O., subject, nevertheless, to all the terms and conditions of the policy.

Attached to and forming part of Policy No. 223 of the Norwich Union Fire Insurance Society, New York, issued at its Cumberland, Ohio, agency. Dated June 24, 1926."

So, the language of the policy, in using the words "unless otherwise provided by agreement indorsed hereon or added hereto" require nothing further or more than when the company itself, under the full powers of the Ohio agent who countersigned the policy and accepted the premiums and had knowledge of the chattel mortgage, inserted in the rider "Any loss under this policy that may be proved due the assured shall be payable to the assured and the Cumberland Savings Bank Co., Cumberland, Ohio." That was either a clear and clean notice that the company had an interest and that the assured was not the sole and unconditional owner, or if it would be a doubtful clause or expression in the contract that would be susceptible of offering proof of the language used by the contracting parties which was admitted in evidence in what sense the terms were used and in what sense the agreement was used, because of this full power given to the agent under the Ohio statutes. And then,

applying the doctrine that is in dispute that the terms of the policy should be, if ambiguous, construed against the insurer who furnished the forms of the rider.

In the two cases cited on page 227 of the majority opinion known as Commercial Union Fire Insurance Co. v. Marshall case, 18 Fed. (2d), 457, and Firemen's Insurance Co. v. Brooks, 32 Fed. (2d), 451, by unanimous opinion by this court sustained Judge Hough and sustained the Court of Appeals in the three cases at bar, that such a notice in the rider was tantamount to an indorsement in accordance with the provisions of the policy permitting an encumbrance of the property.

"As the interest may appear" was not a statement made to a mere solicitor, but, was advice and knowledge given to the company itself under the statutory definition of an agent who had the right and did exercise the privilege of writing the policy itself and accepting the money for the premiums. It eliminates these three cases from the long and tedious differentiating "an agent" from "a solicitor."

Counsel for the appellants, notwithstanding the statutory authority given an Ohio agent and construed by the Ohio courts, still, calls J. M. Bracken, the agent writing these policies, "a solicitor."

Counsel for the appellants also complains that because the obiter dictum in the Atlas case laid stress upon the fact that there was no "custom" alleged or proven as to what language was used in the case when a chattel mortgage was the lien in question authorizing this generic form used as in the case at bar. That is not the issue

in the case at bar in these policies, for the reason that this was not a solicitor, it was the company itself represented under a license agreeing to comply with the Ohio statute and not invoke any federal question that would in anywise exercise the power of cancelling the conditions upon which this company itself entered Ohio, and when the agent appointed under the Ohio laws used this form of rider on the same state of facts in which there was a chattel mortgage, defective as it was, upon this wool or the property insured, and then with that information used three successive riders using the same language, protecting the insurer as well as the insured and validating the policy with such a lien as the record shows was given upon said property by a defective chattel mortgage to the Cumberland Savings Bank Co.

Therefore, the trial court as well as the appellate court was justified in treating that, if such requirement, as a custodian in this particular locality, and to come to the conclusion as that the majority of the opinion of the court indicates on page 227, that this agreement was fully complied with where they attached in each case this rider contract.

Therefore, the two propositions of the majority opinion, as appears on page 228 of the record, seems to be entirely justified, namely, "that if there were no other consideration, the familiar rule that an ambiguity should be solved against the insurance company, the party which selected the language used, would be applicable; for it is at least not clear that the language used might not have been intended to refer to that very interest which Trimby

in fact had in the property and which he and his grantor had agreed should be insured by the grantor and by this policy for Trimby's benefit." In this case it clearly appears that the indorsements were made with full knowledge of the facts and were intended to authorize the encumbering of the property by chattel mortgage. They are sufficiently comprehensive, for that purpose, and being so intended, they seem to us to be quite as effective as they would have been had they contained the further phrase "as interest may appear."

And if the court adverts to the concession in the pleadings above cited in the answer to the second amended petition as well as to the first amended petition, the company have put the same construction upon this rider that the company put upon it in its pleading.

C.

As to the proposition argued in the brief for a writ of certiorari, counsel further complains because Bracken was in a dual capacity in representing both the Cumberland Savings Bank and the insurance company in this deal.

That is a novel proposition to inject into this case, for they selected their own agent who was publicly known and was cashier of the bank, and if they had an agent who was not protecting the rights of the company because of that dual agency, in the language of modern slang, "that was too bad." But they should not be doing a business of this importance with an agent they could not trust. They should pursue their remedy against

the alleged defaulting agent, because the statute as against us forestalls any such construction to his agency. The statute vouches for his potency in this contract, and they cannot be heard as against us to raise any such question.

That issue was not in the Atlas case, and therefore would not avail them in this discussion.

Point I (p. 48). Surely this is not a ground for this petition for writ of certiorari as against us! If they are using a contract of their own invention that they cannot understand, they should not punish the insured by asking the delay and expense of going to the United States Supreme Court to tell them what kind of a rider clause they should attach to their policy when they have the full power of drawing the terms and have the facts of the mortgage lien when they so attached the rider. That is a novel proposition to bring before this honorable court.

Point J (p. 49). Surely this has no place in this petition for writ of certiorari, for it in nowise was involved in the Atlas case. It doesn't make any difference so far as that point is concerned whether the trial court who decided the question on the weight of the testimony and the Court of Appeals affirmed the judgment on the weight of the testimony, therefore, it is an issue raised in the testimony of the trial court as an ordinary law suit that has no business being injected in this case. And we do not believe it requires a discussion.

The record showed that there was proof offered that there was an entire consumption of the wool, that there

was no salvage. And although Harrod, the adjuster, was present he did not take the stand and deny the overwhelming proof in the trial court of the total destruction of the property (pages 66 and 67 of the Record).

It is not a constitutional question or a question of the mails or nowise a federal question, but is a trial upon an Ohio contract before an Ohio jury and upon Ohio evidence and decided by Judge Hough in his overruling the motion asking judgment for plaintiff on statement of counsel, overruling the motion at the close of plaintiff's evidence, overruling the motion at the close of defendant's evidence, overruling the motion for a new trial, overruling a motion for a rehearing, and the Court of Appeals sustained the trial court and the Court of Appeals in refusing a rehearing.

We confidently think the writ of certiorari is raising simply a moot question that is not cognizable in this court.

Said appellants have or had their day in court, both federal and state, in which they have tested out some nine times this same issue and every time have been politely and patiently listened to and then rejected.

THE LOSS-PAYABLE CLAUSE RIDER.

Point A.

The provision of the policy allowing liens or interest of third parties in the insurance fund complied with.

The insurance contract expresaly provides:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be

void, if the subject of insurance be personal property and be or become incumbered by chattel mortgage."

It was proven "otherwise by agreement and endorsed in the rider" to whom the insurance money in case of fire should be paid to. Therefore, the rider protected the insured. This agreement was made by the company itself, with the knowledge of the existing bank's lien, furnished by the construction of the provisions of a statutory agent. See Section 9586, General Code of Ohio, construing The Hartford Fire Ins. Co. v. Glass, 117 Ohio State, 145, and other authorities cited.

Point B.

The appellants were foreign corporations to the state of Ohio, and licensed to do business under the Ohio statutes. See the case of National Ins. Co. v. Wanberg, 260 U. S., 71.

The business of insurance companies is not interstate commerce, but purely an intrastate transaction, governed by the local law.

Hooper v. California, 155 U. S., 648, 652.
Miller v. Maryland Casualty Co., 193 Fed., 343 (113 O. C. C. A., 267).
Hancock Mutual Life Ins. Co. v. Warren, 181 U. S., 73.
New York Life Ins. Co. v. Deer Lodge County, 231 U. S., 495.
Orient Ins. Co. v. Daggs, 172 U. S., 557.
New York Life Ins. Co. v. Cravens, 178 U. S., 389.

Point C.

The validity and construction of a contract depends upon the applicable statutes and decisions of a state in which the contract is made or to be performed.

Union Trust Co. v. Grosman, 245 U. S., 412.
Pritchard v. Norton, 106 U. S., 124.

Point D.

The insurance business is affected with a public interest, and the state in which insurance contracts are written and to be performed has the right to regulate and control that business, whether it be conducted by a foreign or domestic corporation.

National Ins. Co. v. Wanberg, supra.
German Alliance Ins. Co. v. Lewis, 233 U. S., 389.
Waters-Pierce Oil Co. v. Texas, 177 U. S., 28.

Point E.

A state can do with foreign corporations what it may do with corporations of its own creation.

Hancock Life Ins. Co. v. Warren, 181 U. S., 73.
National Ins. Co. v. Wanberg, 260 U. S., 71.

Point F.

Even an express agreement in the application or the policy cannot avoid the law of the state in which the policy is written.

National Ins. Co. v. Wanberg, supra.
New York Life Ins. Co. v. Cravens, 178 U. S., 389.
Mutual Life Ins. Co. v. Hill, 193 U. S., 551.

Point G.

In the case relied upon by appellant in his entire argument (Atlas Reduction Company v. New Zealand Ins. Co., 138 Fed., 497-508), the said statutes and said decision under the statutes were not involved. Therefore, are not to be considered as a contra case, and no discussion of the statutes were involved.

Point H.

Construing Section 9586, General Code of Ohio, the highest court of the state holds, that a person who solicits insurance and procures the application therefor shall be held to be the agent of the company issuing the policy, anything in the application or policy to the contrary notwithstanding.

Foster v. Scottish Union, 101 Ohio St., 180 (127 N. E., 865).

The company's agent in this case knew appellee's business and knew that he paid cash to firms and to various persons for said wool, and that he was required to secure credit from the bank, and knew that there was a chattel mortgage.

The Ohio Supreme Court in the Foster case, supra, held that, where the company's agent had full knowledge of the assured's title to the property, and with such knowledge and on behalf of the company issued the policy and accepted payment of the premium, the company was estopped to assert as a defense to its liability on the policy that the insured was not the absolute owner in

fee simple of the property insured. In construing and applying Section 9586, General Code of Ohio, the court further held that under its provisions a person who solicits insurance and procures the application therefor is the agent of the company, that the knowledge of such agent is the knowledge of the company, and that plaintiff could recover, notwithstanding a clause in the policy provided that "no officer, agent, or other representative of this company shall have power to waive any condition or provision of this policy, except by agreement indorsed hereon or added hereto." This Ohio statute was in force and this decision was announced some year prior to the writing of the policy in suit. Necessarily the law of Ohio, as construed and applied by the court of last resort of that state, entered into and became a part of this contract of insurance, the same as if it had actually been written therein.

Foster v. Scottish Union, 101 Ohio St., 180.

The laws of Ohio in this judgment is right, and was affirmed by the trial court and by the Circuit Court of Appeals, without requiring the defendants to bring suit in equity to reform his contract.

Point I.

This action was brought in the Ohio court. It was removed by the insurance company to the federal court upon the sole ground of diversity of citizenship. If the cause had continued to final judgment in the Ohio court, then, under the law and public policy of Ohio, as declared

by statute and the court of last resort of that state, the plaintiffs would have been entitled to judgment upon proof that the agent was fully informed as to appellee's title.

Point J.

If the judgment had been right in the Supreme Court of Ohio it would be right in the District Court of the United States, sitting in the same district of the same state.

Union Trust Co. v. Grosman, 245 U. S., 412.
Pritchard v. Norton, 106 U. S., 124.

Point K.

There must be uniformity in a state system of insurance, if domestic insurance companies must comply with the law and public policy of a state, and foreign insurance companies, in direct competition with the domestic companies cannot be permitted to avoid compliance with the Ohio laws by merely transferring the cause from the state court to the federal court on the sole ground of diversity of citizenship.

Miller v. Maryland Casualty Co., supra.

Point L.

The federal court will not compel the Ohio system of insurance as to foreign corporations on an intrastate contract to be operated upon other than a uniform system, under which foreign and domestic insurance companies will be liable alike and the policy holders equally protected, and the federal court has so held in the case of Miller v. Maryland Casualty Co., supra.

Point M.

This uniformity is not possible under the rule announced in the minority opinion in the case at bar that counsel is trying to sustain. The brief is not applicable in the Atlas case, supra, because these questions were not raised.

Point N.

Where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage.

Insurance Co. v. Wilkinson, 80 U. S., 222, 223.

Point O.

It was first established by courts of equity, and has since been extended to courts of law.

McAfferty v. Conover, 7 Ohio St., 99.

Point P.

It will not be presumed that the insurance company, at the time it issued this policy, and inserted the rider, intended to insist upon this construction that made the policy worthless when issued, and accepted the premiums knowing it to be worthless.

Point Q.

Under the settled public policy of Ohio, and under the provisions of Section 9566, General Code of Ohio, and under the construction of said statute by the highest

court of the state of Ohio, as to the knowledge of the agent as to the title of the property insured is the knowledge of the insurance company he represents. The evidence showed the agent knew that the appellee was a wool dealer in and about small towns, that he borrowed his money by putting a lien on the wool in the warehouse and made a contract and attached a rider that covered that situation.

Point R.

It is said by the Supreme Court of the United States in Insurance Company v. Wilkinson, supra:

> "It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais."

The decision of the Ohio Supreme Court in Foster v. Scottish Union, supra, is based upon this principle, so clearly stated by the United States Supreme Court in Insurance Co. v. Wilkinson, and this has been uniform holding in Ohio.

Richards v. American Fire Brick & Clay Co., 69 O. S., 359.
Sidners v. Concrete Co., 13 O. C. C. R. (N. S.), 481, affirmed 87 Ohio St., 519.
Insurance Co. v. Roberts, 27 O. Cir. Ct. Rep. (N. S.), 10.

Point S.

No presumption obtains that parties to a rider purporting to be a valid contract were intending to do a vain

and foolish thing. The doctrine of estoppel, when the facts are fully known to the insurance company at the time the policy is issued, is not only consistent with modern ideas as to uselessness of barren technicalities in the administration of justice, but also consistent with the public policy to prevent a multiplicity of suits. The Ohio Code provides that there shall be but one form of action, to be known as a civil action. Many other states have likewise departed from ancient forms and useless distinctions that hinder, obstruct, and delay litigation to no purpose. Under the new Judicial Code of the United States the same doctrine now applies.

Liberty Oil Company v. Condon Bank, 260 U. S., 235.

United States v. Richardson, 223 Fed., 1010, 1013.

Point T.

Under the provisions of this act, a federal court now, if it did not before its passage, has the same jurisdiction as the Ohio state court to hear and determine the question of estoppel, without requiring the added expense and delay of a separate suit in equity to reform the contract.

Admissions in the answer to the second amended petition puts its own construction upon this rider, to wit, that the Cumberland Savings Bank Company of Cumberland, Ohio, had title to or interest in said wool or part thereof located in said building at the time of said fire.

Judge Hooks' opinion has been followed in the above cited authorities and is followed in the cases of Firemen's

Insurance Company v. Brooks, 32 Fed. (2d), 451, and Commercial Union Fire Insurance Company v. Marshall, etc., 18 Fed. (2d), 457.

As to the policies in the three consolidated cases with riders and providing that any loss occurring under the policy should be payable to the insured and the Cumberland Savings Bank Company of Cumberland, Ohio, is notice for all purposes and for all questions of liens.

The two decisions by the Federal Court in the case of Commercial Union Fire Insurance Co. v. Marshall, etc., 18 Fed. (2d), 457, and Firemen's Insurance Co. v. Brooks, 32 Fed. (2d), 451, it being under the Ohio law, it is held, that such a rider is a contract and allowed by the policy to be endorsed in accordance with the provisions of the policy permitting an encumbrance on the property. The Federal Court of Appeals in this case on page 227 of the record say "under the circumstances we do not think a legal distinction can be founded upon the absence of that phrase 'interest may appear' from these policies." Quoting Bates v. Equitable Insurance Company, 10 Wall., 33, and other authorities, and quoting the Atlas case with approval.

The question of the arbitration is not an issue in the petition for writ of certiorari. It is not involved in the contra case relied upon, Atlas case, supra, and if it did the opinion of the majority court is conclusive under the evidence uncontradicted, as appears on page 66 of the record, to wit, there it was conceded that there was an entire destruction of all property by the fire, and that is a

question for the lower court and the jury to determine and is not a question for the higher court.

The Atlas case, by the Supreme Court, in effect, has long since in the twenty-five years, been overruled, and the minority opinion of Judge Hook, both by the lower and higher courts seem to be approved.

CONCLUSION.

There is no diversity of opinion any longer in the federal court on this subject, therefore, it is a mere moot case and the court should not be called upon to instruct insurance companies how to write loss payable clauses without containing sleepers therein, or snares therein, to collect premiums off of the citizens of the state of Ohio.

This honorable court on March 16, 1931, denied application for review of the following two cases involving the interpretation of clauses of insurance policies, which in principle are authority as we construe it to deny this writ. See The Union Central Life Insurance Company v. Harvey, No. 717, and The New York Life Insurance Company v. Rositzky, No. 736, refusing a writ of certiorari on March 16, 1931.

Clarksburg Trust Co. v. Commercial Casualty Ins. Co., 40 Fed. Rep. (2d Ed.), 626, Syllabi 10 and 13 are as follows:

> "Court has power of its own motion to transfer cause to equity and send it back for hearing in accordance with equitable rights of parties.
>
> Although Judicial Code, Sec. 274-a, Act March 3, 1915, 38 Stat., 956 (28 U. S. C. A., Sec. 397), authorizing amendment to pleadings in case of suit brought in equity, which should have been brought at law, or suit at law, which should have been brought in equity, does not abolish distinctions be-

tween actions at law and suits in equity, its purpose was nevertheless to end unseemly practice of turning litigant out of court because of failure to institute action on proper side.

Appellate court will transfer cause from law to equity or vice versa on its own motion, regardless of failure to properly raise question in lower court when otherwise failure of justice may result."

Then again on pages 633 and 634 the court held:

"While this statute does not abolish the distinction between actions at law and suits in equity, there can be no question that its purpose was to end the unseemly practice of turning a litigant out of court because he had come in at the wrong door." As said by Chief Justice Taft in Liberty Oil Company v. Condon Bank, 260 U. S., 235, 43 S. Ct., 118.

"It is said, however, that by instituting the action at law plaintiff has elected between its legal and equitable rights, and is estopped by such election from now asking that the cause be transferred to equity. This result would not follow in the situation here, even if the right of transferring to equity were not given by statute. See Northern Assurance Co. v. Grand View Building Ass'n, 203 U. S., 106, 27 S. Ct., 27, 51 L. Ed., 109. But the statute above quoted and the interpretation placed upon it in the case of Liberty Oil Co. v. Condon Bank, supra, would seem to have removed all doubt with regard thereto. There would be no sense in providing that an action erroneously instituted at law might be transferred to equity and proceeded with there, if instituting the action of itself amounted to an election of remedies and an abandonment of equitable relief."

JAMES JOYCE,
ELWOOD MURPHY,
F. S. MONNETT,
Counsel for Respondent.